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No. 981

Supreme Court of the United States

OCTOBER TERM, 1962

RISS & COMPANY, INC., *Petitioner*,

v.

THE ASSOCIATION OF WESTERN RAILWAYS, TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, EASTERN RAILROAD PRESIDENTS CONFERENCE, CARL BYOIR & ASSOCIATES, INC., and THE PENNSYLVANIA RAILROAD, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that a judgment for the plaintiff in an antitrust treble-damage action could not stand where the District Court had conducted the entire trial, and had repeatedly instructed the jury, on the theory, subsequently rejected by this Court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, that

joint solicitation of governmental action violates the Sherman Act if done with a purpose to restrain trade or eliminate competition?

2. Did the Court of Appeals correctly hold that defendants in an antitrust treble-damage action were entitled to judgment on a jury verdict finding that there was a conspiracy, but that the plaintiff was entitled to no monetary damages?

COUNTERSTATEMENT OF THE CASE

1. The issues raised by the pleadings

Petitioner, a trucker, filed suit September 22, 1954, against 85 railroads, four railroad associations, and a public relations firm, charging a conspiracy in violation of Sections 1 and 2 of the Sherman Act and claiming $30,000,000 damages. As originally filed, the complaint charged that the defendants had conspired to restrain and eliminate petitioner as a competitor in the transportation of freight by five means:

(a) Solicitation of state officials to seek cancellation of petitioner's operating authority;

(b) Solicitation of "statutes, ordinances, and regulations" which would "render motor carrier operations impractical and economically unfeasible";

(c) Solicitation of public officials "to harass and impede" petitioner's operations "through the unusual enforcement" of laws;

(d) "Abuse of the privilege of intervention and participation in proceedings before the Interstate Commerce Commission" affecting petitioner's operating authority by soliciting participation in

those proceedings of various civic and community organizations; and

(e) "Institution of a campaign" of publishing "false and malicious statements" concerning petitioner and its operations, which petitioner describes as "soliciting opposition to, and advocating denial of, the then-pending application of Riss before the Interstate Commerce Commission for permanent authority to transport munitions" (Petition, p. 9).

In 1958, after the case had been pending more than three and one-half years, the complaint was supplemented to charge that another means which the defendants had used in furtherance of the conspiracy originally alleged was reductions in railroad rates for transporting ammunition and explosives for the Federal Government.[1] Since the reductions were made through rate bureaus created by agreements approved by the ICC under Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5a, and in accordance with procedures set forth in those approved agreements, they were conceded by petitioner to be exempt from the Sherman Act unless made pursuant to the conspiracy alleged in the original complaint. These reductions were the only overt acts other than the solicitation of governmental action ever alleged by petitioner.

[1] During 1954 and 1955, when the total governmental traffic in ammunition and explosives had substantially lessened, the portion of that traffic carried by the railroads had itself declined in the face of mounting truck competition. Finally in late 1955 and early 1956, after vigorous Defense Department prodding and clear indication that the railroads would get little government ammunition and explosives tonnage without reducing their rates, the defendant railroads, and others, reduced those rates throughout most of the United States.

2. The trial

Before trial, 62 railroad defendants were dismissed. On January 5, 1960, the railroad associations, the public relations firm and 23 railroads went on trial before a jury.

The great preponderance of the evidence introduced by petitioner was concerned with joint action by defendants to obtain action by the ICC and state legislatures. Thus petitioner introduced voluminous evidence as to an ICC proceeding known as MC-200 (Sub 84) in which it and many other truckers had unsuccessfully sought permanent authority to transport explosives; as to another ICC proceeding (MC-C-1413) in which the Public Utilities Commission of Ohio had petitioned for revocation of all petitioner's authority to operate through Ohio because of its numerous violations of law; as to a third (MC-C-1783) in which the ICC had investigated petitioner's operations with respect to compliance with the ICC's safety regulations and determined that petitioner operated in flagrant and wilful violation of those regulations; and as to still another (MC-200 (Sub 60TA)) in which the ICC had found that a large part of petitioner's explosives business was being conducted without legal authority. Petitioner showed at great length that in each of these proceedings the railroads opposed it, and that the results of the proceedings were adverse to it. Counsel for petitioner read to the jury, as part of the evidence of "conspiracy" by defendants, the complete text of the Examiners' Reports and Final Decisions in these proceedings.

With respect to petitioner's allegations as to joint activities by defendants directed to obtaining state governmental action, petitioner introduced a draft bill

to limit truck shipments of explosives that had been prepared by a railroad attorney, copies of similar bills introduced in the legislatures of many states, a large map showing these states, and the testimony of a Federal employee who had appeared in opposition to certain of the bills. Petitioner also introduced evidence of efforts by the defendants to secure the passage of state statutes increasing taxes on truckers.

In addition to the foregoing, petitioner laid great evidentiary stress on the publicity and public relations efforts of defendants to gain support for their attempts to obtain governmental action.

3. The District Court's Adoption of the Mistaken View of the Law Set Forth in the Lower Court Decisions in the Noerr Case

During the course of the opening arguments, and thereafter at frequent intervals throughout the course of the 120-day trial, the District Court noted the similarities between many of the facts of the case before it and those involved in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, which at that time had been recently decided by the Court of Appeals for the Third Circuit and not yet reversed by this Court. (J.A. 1119-1122; 1123; 1124; 1196-1197; 1381; 2732-2733) The Court expressed its agreement with the principles of law enunciated by the District Court and Court of Appeals in *Noerr*, and its intention "to follow that rule of law in this case" (J.A. 1119) Consistent with these expressions, the Court throughout the trial, in ruling upon defense objections to testimony and other evidence and in comments to the jury explaining those rulings, continually acted on the view that joint efforts to solicit governmental action are forbidden by the antitrust laws if

their purpose is to bring about a restraint or an elimination of competition.

This erroneous view of the law was drilled into the jury's mind by instructions given at the beginning of the trial, by repeated instructions given during the course of the trial, and by the final instructions, in all of which the jury was told that joint solicitation of governmental action, through sponsorship of legislation or through participation in administrative proceedings, whether by solicitation of the testimony of witnesses before the ICC or otherwise, violated the Sherman Act if done for the purpose of eliminating competition or creating a monopoly. (App. 81a-83a; J.A. 1113; 1273-4; 1330-1; 1379-80; 1485-8; 2371; 2846; 2847-8; 2849-50; 2918-9; 4271-3) The District Court also denied defendants' requests for instructions stating the proper rule that "Joint action to persuade a sovereign power (federal, state or local government) to act, even if taken for the purpose of eliminating competition, is not actionable under the Sherman Act". (J.A. 844; see also J.A. 930-1; 936; 937-8)[2]

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[2] The fact that, contrary to the impression sought to be conveyed by petitioner's Statement of the Case, activities of the kind involved in Noerr played a predominant part in petitioner's theory of the case and evidence, and were emphasized in the trial court's instructions, is confirmed by the description of the Court of Appeals:

> "Both the complaint and the evidence were largely though not entirely concerned with efforts of the defendants to influence legislative and administrative action. The principal question of law was whether the Sherman Act condemns such efforts when they are jointly made for the purpose of destroying or restricting competition. The District Court answered this question in the affirmative and instructed the jury accordingly, relying expressly on [Noerr as decided by the Court of Appeals]." (App. 144a)

4. The verdict

At the completion of its closing charge to the jury, the District Court gave to the foreman a form of verdict consisting of two questions: (1) "What is your verdict as to the plaintiff against each of the following defendants?"—followed by a list of the 28 defendants, and (2) "If your verdict is in favor of the plaintiff against two or more of the defendants, what is the total amount of your verdict?"—followed by "$ .....". After its deliberations had extended into their ninth day, the jury asked the Court:

> "If the jury should agree there was a conspiracy and voted for the Plaintiff but agreed the Plaintiff was entitled to no monetary damages, would this be an acceptable verdict to the Court?"

The Court refused to answer this question. (App. 108a-115a)

Early on the afternoon of the next day, the jury returned a verdict. With respect to 23 of the 28 defendants the words "For Defendant" had been written after the name of the defendant on the verdict form described above. As to the remaining five defendants (the respondents here), the jury returned the verdict that it had stated to the Court in its question on the preceding day. Beside each of the five respondents' names was written "For Plaintiff", denoting in the terms of the jury's question simply that "there was a conspiracy" in which those respondents had participated. The jury's finding that that conspiracy had not injured petitioner was expressed in the verdict by insertion of

the word "None" in the space relating to damages.[3] (App. 119a-124a)

Respondents' counsel pointed out that on this verdict respondents were plainly entitled to judgment, since an indispensable ingredient of a private antitrust cause of action is proof of injury to the plaintiff.[4] The Court, however, although recognizing that "If there are no damages it ought to be a verdict for the Defendant" refused either to accept the verdict as it stood and enter judgment thereon in favor of respondents or to instruct the jury to correct the form of the verdict by changing the words "For Plaintiff" to "For Defendant". (App. 121a-122a; 125a-129a) Rather, the Court indicated an apparent determination that the jury withdraw its conclusion that petitioner's cause of action had not been established, stating that "I am going to ask them to go back and ask them to assess damages, even if it is

[3] Petitioner's brief to the Court of Appeals twice expressly conceded that this verdict was in fact "the verdict originally suggested hypothetically" (Riss Br. 44), and the "hypothetical question presented in verdict form" (Riss Br. 45): *i.e.*, unanimous agreement that there was a conspiracy, and unanimous agreement that petitioner was entitled to no monetary damages. The trial judge construed this verdict in the same way, saying "They find no damages". (App. 121a)

[4] This verdict was not only clear and internally consistent, but also was wholly appropriate on the evidence. One of the factual issues most hotly contested at the trial was whether, even if all or some of the defendants had conspired and petitioner's revenues and worth had simultaneously declined, any causal relationship could be established between the two events. Defendants introduced substantial evidence that any financial reverses suffered by petitioner were due to causes entirely unrelated to any conspiracy—for example, that petitioner's own records showed that large losses had been caused it by adverse ICC decisions and by faulty equipment—and stressed this failure of proof of causation in their closing arguments.

nominal", and again "I think I will let the jury go back out and tell them that I am not going to accept this verdict, unless they make some assessment as to nominal damages—it can be any amount they wish to put in there." (App. 125a-126a)

The Court then told the jury, over the objections of the respondents and without any clear explanation, that their verdict was illegal and would not be accepted, gave a partially extemporized supplemental instruction solely on damages, and sent the jury out to deliberate further. (App. 129a-130a) The jury returned barely an hour later, bringing back the very piece of paper on which their original verdict had been reported. That form had been altered only by drawing a line through the word "None" and writing "75,000" beside it. (App. 137a) The Court thereupon entered judgment for petitioner in the trebled amount of $225,000, with costs, denied costs to the prevailing defendants, and refused to credit prior settlement payments against the judgment. (App. 138a-140a; 144a).

5. The Decision of the Court of Appeals

Respondents appealed to the Court of Appeals for the District of Columbia Circuit. That Court, in a unanimous opinion written by Judge Edgerton, held first that because the District Court's entire conduct of the trial, and its instructions, had been in express reliance upon the *Nocrr* case as decided by the Court of Appeals for the Third Circuit, a reliance that this Court's subsequent unanimous reversal in *Nocrr* had shown to be erroneous, the judgment for petitioner could not stand, irrespective of any other error. The Court then went on to hold that the District Court's failure to accept the jury's original verdict was a second

ground for reversal, and that furthermore, since that verdict was a valid determination in favor of all the defendants, it was necessary not merely to reverse the judgment for petitioner, as dictated by this Court's holding in *Noerr*, but to direct the entry of judgment for respondents.[5] (App. 142a-147a)

REASONS FOR DENYING THE WRIT

1. The Court of Appeals' holding that reliance by the District Court upon an erroneous legal theory required reversal of that court's judgment presents no question warranting review by this Court

Reversal by the Court of Appeals of the District Court's judgment in favor of petitioner was unavoidable. Petitioner's case was conceived, tried and submitted to the jury on the theory that joint solicitation of governmental action violates the Sherman Act if done with a purpose to restrict trade or eliminate competition. (App. 76a-88a) In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, that theory was unanimously rejected by this Court. In these circumstances, the Court of Appeals could only

[5] The Court of Appeals did not find it necessary to rule upon several other grounds urged by respondents as requiring entry of judgment in their favor. These included: (a) the absence of substantial evidence of any conspiracy preexisting the filing of the complaint other than joint solicitation of governmental action; (b) the lack of evidence that the rate reductions were made for any reason other than governmental and economic pressures; (c) the lack of substantial evidence that any decline in petitioner's financial position was proximately caused by the rate reductions; and (d) the exemption from the antitrust laws granted by Section 5a(9) of the Interstate Commerce Act to rate reductions made in accordance with agreements approved by the ICC. These grounds, of course, would have to be considered and rejected before any new trial could properly be granted.

hold, as it did, that the judgment for petitioner could not stand.

Because this ruling is plainly unassailable, petitioner now contends that the Court of Appeals made a different and more sweeping decision. Thus, petitioner says that the Court of Appeals held that "this Court's opinion in *Noerr* in effect overruled the 'lawful act' doctrine of *American Tobacco*", and also held that "mere presentation" of "legislative and law-enforcement activities" to the jury "warrants entry of judgment for defendant in antitrust cases". (Petition, pp. 6, 29, 30) Petitioner then argues from these assertions of its own that "the view espoused by the Court of Appeals" means that immunity from the antitrust laws can be obtained by would-be offenders "merely by including in their activities a concerted petition for legislative relief from competition." (Petition, p. 30)

These assertions and this argument are without merit. The Court of Appeals made no such rulings and espoused no such views. That Court held only that the District Court's thorough-going reliance on the erroneous lower-court *Noerr* decisions required reversal of its judgment; not that such errors entitled the respondents to judgment in their favor. The Court did not make a single reference to the "lawful act" doctrine, or in any way intimate that actions that violate the antitrust laws are shielded if the violators also seek to obtain governmental action. It had no occasion even to consider these matters.

The Court of Appeals noted that under the complaint and the evidence "the principal question of law was

whether the Sherman Act condemns such efforts [to influence governmental action] when they are jointly made for the purpose of destroying or restricting competition", and that the District Court "answered this question in the affirmative and instructed the jury accordingly", relying expressly upon the lower courts' decisions in *Noerr*. (App. 144a) The Court of Appeals then pointed out that four months after the District Court judgment in favor of petitioner, this Court reversed the *Noerr* case. (App. 144a-145a) Its entire ruling as to the significance of this Court's *Noerr* decision in the circumstances presented by the record of the case before it is contained in these two sentences from its opinion:

> "The Supreme Court held [in Noerr], contrary to the District Court's instructions to the jury in the present case, that joint solicitation of Government action with respect to the passage or enforcement of laws does not violate the Sherman Act, even if its purpose is to destroy competition and even if deceitful propaganda is used. Irrespective of any other evidence in the present case, therefore, and irrespective of any other error, the District Court's judgments cannot stand." (App. 145a)

Thus the Court of Appeals' ruling rests on the simple proposition that any judgment for a plaintiff that is rendered after a trial held within the framework of, and on the basis of, instructions applying and emphasizing legal principles thereafter specifically disapproved by this Court must be set aside. No gloss or assertion by petitioner can inflate that ruling into a rejection of the "lawful act" doctrine, or the creation of a device for shielding violators from the impact of the Sherman Act.

2. THE COURT OF APPEALS' CONCLUSION AS TO THE MEANING OF THE JURY'S VERDICT PRESENTS NO QUESTION WARRANTING REVIEW BY THIS COURT

The remaining question is whether this Court should review the Court of Appeals' ruling that not only was reversal of the judgment for petitioners required, but judgment should be entered for respondents—a ruling based on that Court's unanimous determination that in the special circumstances of this case a jury verdict which contained a finding "For Plaintiff" and also an affirmative finding that the amount of damages was "None" was a verdict in favor of the defendants. (App. 145a-147a)

This determination presents no question appropriate for review by this Court. The correct interpretation of such a jury verdict does not present an issue of importance in the administration of the antitrust laws or in any other respect. The issue of the meaning of such a jury verdict has arisen only once in a Federal court prior to this case, and there is no reason to expect that it will again arise in the foreseeable future.[6] Its

[6] See Poydock v. Adams Transfer and Storage Co., 51 F. Supp. 375 (W.D. Pa. 1943), a wrongful death action where the court reached precisely the same result as that here challenged. There the jury had returned a verdict "in favor of plaintiff" in the sum of "None" and the court held that "despite its rather peculiar form, the verdict can be interpreted only as a finding in favor of the defendant." Compare Schutte & Koerting Co. v. Fischer, 4 F.R.D. 11 (E.D. Pa. 1944), where a jury that agreed "there should be no money awarded" to an antitrust plaintiff was directed to bring in a verdict for defendant, upon which judgment was entered.

Petitioner urges that the Poydock case is actually contrary to the decision below because in Poydock the plaintiff was granted a new trial. That new trial was, however, granted on a ground which had no connection with the form of the jury verdict, *i.e.*, that in the circumstances of that case a judgment for defendants was unjustified by the evidence. There is no suggestion in the case that the form of verdict itself would have justified a new trial.

resolution here is plainly of no significance whatever to anyone except the immediate parties.

Petitioner suggests that the decision below presents the question whether an appellate court may, consistent with the Seventh Amendment, arrogate to itself the authority to decide at large what verdict it would consider appropriate and then direct the entry of judgment on the basis of that verdict. (Petition, pp. 35-36) But this is not a case in which the Court of Appeals made its own findings of facts and substituted them for those made by the jury. The Court of Appeals directed the entry of judgment only after first determining that the jury had "plainly meant that five of the defendants had conspired and plainly meant that the conspiracy had not damaged Riss", and thus gave full and scrupulous deference to the prerogative of the jury as fact-finder. (App. 146a) In these circumstances, even were there room for disagreement with the Court of Appeals' conclusions as to the actual meaning of the jury verdict, this case would present no question under the Seventh Amendment that justifies this Court's exercise of its discretionary review jurisdiction. Any possible error would be one relating not to any question of general significance but rather to one of the narrowest and most particularized scope—whether a particular verdict in a particular form rendered in particular surrounding circumstances was in fact ambiguous.[7]

[7] Petitioner implies that the decision below is inconsistent with prior decisions of the Court of Appeals. (Petition, pp. 31-32). Even were this so, no issue warranting the intervention of this Court would be raised, since petitioner can claim no vested right in the continuance of any prior course of adjudication. In fact, however, each of the prior decisions of the court below cited by petitioner is entirely consistent with the result here reached. In each the court either itself corrected a formally odd verdict or specifically directed the jury to eliminate the formal oddity to conform to the substance of the verdict as rendered.

—In fact, it is clear that the Court of Appeals' reading of the verdict was precisely that intended by the jury. The finding that petitioner's damages were "None" was not ambiguous, and the finding 'For Plaintiff" as to five defendants—particularly in light of the question asked by the jury of the Court prior to the return of the verdict—necessarily meant simply that those defendants had participated in a conspiracy.[8] Indeed, although petitioner asserts that the verdict was "anything but plain in its treatment of the material issues in the case", it never suggests what possible meaning that verdict could have *other* than that which the Court of Appeals read it as having. Under these circumstances, the Court of Appeals would plainly have been derogating from, rather than upholding, the function and responsibility of the jury had it ruled that the verdict might be disregarded merely because of its formal oddity. And petitioner, in attempting to import ambiguity into that verdict despite the fact that it is entirely internally consistent as read by the Court of Appeals is itself doing precisely what it erroneously accuses respondents of doing—asking this Court to make "a search for one possible view of the case which will make the jury finding inconsistent" and thus risk "a collision with the Seventh Amendment". *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 364.

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[8] It is significant that three of those five defendants—The Association of Western Railways, Eastern Railroad Presidents Conference, and Carl Byoir & Associates, Inc.—admittedly had been involved in the solicitation of governmental action which the trial court had instructed the jury would support a finding of conspiracy, but had had no connection with the rate reductions upon which petitioner's claim of damages concededly depended. Furthermore, nearly all of the 23 railroads in whose favor the jury found *had* participated in the rate reductions of which petitioner complained.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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